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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 550

MARIO PREZIOSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 348 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1965 (Pet. App. B). On August 6, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including September 7, 1965, and the petition was filed on that

day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing leave to withdraw a plea of guilty.

2. Whether the court improperly refused to order the production of government records sought pursuant to 18 U.S.C. 3500 during a hearing on a motion to withdraw a plea of guilty.

STATEMENT

An indictment returned on January 7, 1963, in the United States District Court for the Southern District of New York charged petitioner, Zochowski (also known as Gray), Guiliano, and others with knowingly transporting and conspiring to transport stolen securities in interstate commerce. On the day set for trial, May 6, 1964, petitioner and Zochowski, each represented by retained counsel, withdrew previously entered pleas of not guilty and entered pleas of guilty

to two substantive counts and the conspiracy count (R. III, 1a-9a).[1] The two then testified as government witnesses in the case of Guiliano, which culminated in a jury verdict of guilty on one substantive count on May 13, 1964 (Tr. T. 936). On June 12, 1964, Zochowski moved for leave to withdraw his guilty plea, alleging that he had participated in the crimes charged as an F.B.I. informant and therefore without criminal intent (R. I, 16a-23a). Seven days later, on June 19, 1964, when petitioner appeared for sentencing, he requested a one-month adjournment in order to "clean up * * * affairs" which if left unattended would result in substantial financial loss (R. III, 10a-12a). The court granted an adjournment for two weeks, to July 7, 1964, indicating that within this period petitioner should make arrangements to take care of the business (R. III, 12a). On July 7, petitioner orally moved for leave to withdraw his plea of guilty, on the ground that he had participated in the crimes under duress and that the disclosure by Zochowski that he was an F.B.I. informant revealed that petitioner had a defense of entrapment (Tr. H. 2). After a hearing, the motions by petitioner and Zochowski for leave to withdraw their guilty pleas were denied (Tr. H. 183). Petitioner was sentenced to imprisonment for three years with eligibility for parole at such time as the Parole Board should deter-

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[1] All "R." references are to documents filed with this Court in *Guiliano* v. *United States*, No. 516 Misc., this Term. "Tr. T." refers to the transcript of the trial of the co-defendant Guiliano, and "Tr. H" to the transcript of the hearing on petitioner's motion to withdraw his plea of guilty.

mine. 18 U.S.C. 4208(a)(2). The court of appeals affirmed.

1. At the time of the entry of petitioner's plea of guilty on May 6, 1964, the pertinent counts were read and petitioner indicated that he was familiar with and understood the charges and had discussed them with his attorney (See R. III, pp. 1a-9a). Judge Palmieri explained that he would have to ask certain questions, in order to be absolutely certain that the defendants who were entering guilty pleas understood the significance of their pleas and were taking the step freely, with a clear mind, and with proper understanding. Petitioner then stated that he was entering a plea of guilty after conferring with his attorney, and after having told him fully and frankly everything he knew about his case; that he had been told, and understood, that by entering such a plea he could not ask for a trial or assert his innocence at a later date; and that he understood that the only function left to the court was to impose a proper penalty, probably including a prison sentence. When asked if there were any questions that he wanted to ask either his attorney or the court in connection with the plea, petitioner answered in the negative. Judge Palmieri cautioned that, if there were matters which the defendants had to tell him or their attorneys, "this is the time to do it, and I invite you to do it if you consider that to be necessary" (R. III, 6a). Responding to questions by the court, petitioner assured the court that he had not been "subjected to any threats or coercion of any kind or to any promises of any kind by anybody" (R. III, 6a), and that he was taking this

step of his "own free will" and "without reservations of any kind" (R. III, 6a). After cautioning the defendants that each had a duty, and was invited, to speak now if promises or threats had been made, Judge Palmieri indicated that he was prepared to accept the pleas. Counsel were invited to express any opinions or suggestions as to the voluntary nature of the plea, and petitioner's counsel indicated that he had none.

2. At Guiliano's trial, which followed before Judge Palmieri and a jury, petitioner testified that while employed as a cash margin clerk with the New York stock brokerage house of Sutro Brothers and Company he had delivered stolen securities to Zochowski on three separate occasions between December 1961 and mid-July 1962, and had received approximately $11,200 in return (Tr. T. 37-60). Zochowski, in testimony corroborating petitioner's (Tr. T. 61-93), spoke of securities which "he [petitioner] wanted to steal and * * * wanted me to dispose of" (Tr. T. 63), and which "he [petitioner] wanted to sell * * * and * * * wanted to know if I would buy" (Tr. T. 67). On examination by Guiliano's counsel, Zochowski testified that he had worked as an informant for the F.B.I. and the Secret Service in unrelated investigations, and had "in a manner of speaking" proceeded to work as an informant with respect to the theft from Sutro Brothers[2] (Tr. T. 709-710).

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[2] Zochowski, asked what he meant by a "manner of speaking," explained (Tr. T. 709-710):

> Well, I brought it to the attention of the Government that I was looking to solve the Sutro matter, there was

3. At a hearing on the motions to withdraw the pleas of guilty held before Judge Palmieri on July 29, 1964, Zochowski testified that from June 1960 to October 1961 he had worked in an undercover capacity for the F.B.I. at a weekly salary of $125, and afterwards (until his incarceration in April 1964) had personally participated in more than 100 case investigations (Tr. H. 7-11) pursuant to the F.B.I.'s request that he follow through on matters arising from his original investigations. In October 1961 he was approached in Miami about participation in a possible theft from Sutro. The same week he passed the information on to F.B.I. Agent Clinkscales, who advised him to pursue the matter (Tr. H. 21-23). He then flew to New York, was introduced to petitioner, and agreed to find an outlet for the disposal of the stolen bonds (Tr. H. 25). The following day, petitioner sent word to Zochowski that if he was to entrust the bonds to him he wanted an advance of $1000 (Tr. H. 25). Zochowski testified that upon his return to Miami, "I believe I talked to Mr. Clinkscales and told him as far as it went" (Tr. H. 25). In July 1962 he had a conversation with an F.B.I. agent in Chicago about the illegal activities of one Wuensche (a co-defendant who the agents later discovered was involved in the Sutro transactions) but did not specifically mention the Sutro thefts or his participation (Tr. H. 31-36, 38-

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supposed to be a large theft committed in the Sutro case, in the Sutro Company, and I proceeded to work along those lines, where in the meantime two other cases or three other cases arose to a greater magnitude over the Sutro matter that I was proceeding on.

42). He first mentioned his participation in the Sutro matter in August 1962 after he was approached and questioned by Agent Clinkscales about a bond he had negotiated in Miami, and then in September 1962 after his arrest (Tr. H. 44-48).

Agent Clinkscales and two other agents testified that Zochowski had become an informant for the F.B.I. in 1960 under an arrangement whereby he was paid on the basis of the value of information actually received (Tr. H. 91-93). He was specifically warned "that he should not become involved to the extent that he violated any laws, federal state or otherwise; that should he do so he was subject to prosecution" (Tr. H. 95). After the original arrangement terminated in 1961, Zochowski continued to supply information to the F.B.I. (Tr. H. 96). In June or July of 1961 he spoke to agent Clinkscales about contact with an unidentified individual in New York who claimed to have access to securities taken in the robbery of an unidentified messenger of a brokerage company. He did not mention the matter again (Tr. 97). He spoke generally to another agent in Chicago in July 1962 about the activities of co-defendant Wuensche in a contemplated stock theft (Tr. H. 128). However, at no time did he mention the Sutro thefts until he was confronted in August and September 1962 with evidence of his participation (Tr. H. 98-102, 139). He did not assert an informant's defense at that time (Tr. H. 103), or at any time until the fall of 1963, when he claimed that he had become involved in the Sutro thefts in order to build a larger case for the

Bureau (Tr. H. 140). An agent told him that this representation was untrue (Tr. H. 140-141). He was advised then, and again shortly before the entry of his guilty plea, by the agent and by an Assistant United States Attorney, that if he felt he was not guilty he should enter a not guilty plea and that if he had evidence that he was acting as an informant he should discuss it with his attorney and determine whether he had a legal defense (Tr. H. 141-143).

Petitioner testified (see Tr. H. 156-165) that he was first introduced to Zochowski in 1961 in connection with a proposed tuna fish business and that he borrowed $1000 from Zochowski for that business. In December 1961 Zochowski demanded stock for the $1000 and threatened to have some "strong-arm fellows after me" if he did not supply such stock. He delivered securities to Zochowski after that time only because of threats communicated to him by Zochowski or his associate. He was not paid for the stock, although Zochowski gave him $5000 for attorney's fees. He told his attorney of the threats before he entered his plea of guilty (Tr. H. 175; cf. *id.* at 168, 172), but he did not mention the threats when he testified at Guiliano's trial because he was still afraid. He was told in the summer of 1963, almost a year before he entered the plea, that Zochowski was an informant in his and other cases, but did not relay this information to his counsel.

Judge Palmieri, in denying the motions to withdraw the pleas, found that the relationship of Zochowski to the Sutro thefts was "a relationship of an inde-

pendent criminal with an independent criminal enterprise" and that "[h]is testimony is unworthy of belief and Prezioso's testimony is unworthy of belief" (Tr. H. 182-183). Petitioner's counsel stated to the court that petitioner had told him of threats by Zochowski prior to entering his plea of guilty. The court indicated that this would not change its ruling but would be taken into consideration in sentencing (Tr. H. 189-191).

ARGUMENT

1. Whether to grant a pre-sentence application to withdraw a guilty plea is a matter within the sound discretion of the district court. *United States* v. *Hughes*, 325 F.2d 789 (C.A. 2), certiorari denied, 377 U.S. 907; *Zaffarano* v. *United States*, 330 F.2d 114 (C.A. 9), certiorari denied, 379 U.S. 825. The court of appeals correctly found that the district court had not abused its discretion in denying petitioner's application. There is no occasion for further review of this determination, which hinges on the particular facts and circumstances of this case.

The record shows that petitioner entered his plea of guilty voluntarily and knowingly, with assistance of counsel and with every protection by the court. Judge Palmieri conducted careful and searching examination to determine whether petitioner had conferred with his attorney and had told him fully and frankly everything he knew about his case. The judge apprised petitioner in the strongest language of the seriousness of the step he was taking, and repeatedly invited him to speak or ask questions of the court or

his attorney. Petitioner did not give any indication that he had committed the crime under duress, and it seems incredible that petitioner, knowing for a year prior to the entry of his guilty plea that his codefendant had been a government informant, did not comprehend the significance of that fact to a defense of entrapment or mention the fact to his attorney, who had represented him for over a year.

After the entry of his plea of guilty, petitioner took the stand in Guiliano's trial and repeated that he had sold securities to Zochowski, again without any indication of duress or suggestion of entrapment. At the same time, Zochowski testified generally as to his activity as an informant, and a month later filed a motion to withdraw his plea of guilty on the ground that he had been acting as an agent in petitioner's case. Yet petitioner, appearing seven days later, did not at that time ask to withdraw his plea but requested only an adjournment of sentence. As the court below noted, the circumstances suggest that petitioner's later application was prompted by the court's indication in disposing of the request for adjournment that petitioner could expect to be incarcerated (Statement, *supra*, p. 3). Nevertheless, petitioner was given a full hearing on his application. Judge Palmieri's findings that petitioner's and Zochowski's testimony was incredible and that Zochowski, in his dealings with petitioner had not been acting as a government informant, are fully supported by the evidence.

2. During the cross-examination of F.B.I. Agent Clinkscales at the hearing on the motion to with-

draw the pleas of guilty, petitioner's counsel elicited that the witness had maintained records of payments made to Zochowski as an informant (Tr. H. 120-121). There is, however, no merit to petitioner's claim that he was denied a fair hearing because Judge Palmieri denied his request for production of "any [18 U.S.C.] 3500 material that pertains to this case" (Tr. H. 121-122).

Petitioner's sweeping request for production did not suggest any way in which the F.B.I. files might be material or relevant to the issues before Judge Palmieri—whether petitioner's plea of guilty was voluntarily entered, and whether there was any justification or excuse for his failure to raise the entrapment defense prior to the application to withdraw his guilty plea. Zochowski testified that he had not been paid by the F.B.I. in connection with petitioner's case,[3] and the agent's records of payments made to Zochowski for information furnished in other, unrelated cases could not have had any bearing on the question whether Zochowski had entrapped petitioner

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[3] See page 79 and 80 of the transcript of the hearings, as follows:

By the Court:

Q. This money [money owed him by the F.B.I.] has nothing to do with the Sutro matter, has it?

A. They won't release the money until the Sutro matter comes to a disposition.

* * * *

Q. Does any of this money, reimbursement or reward money, have anything to do with the securities that were stolen from Sutro Brothers?

A. No, it does not.

in the Sutro matter. Nor is there any indication that there were any notes of the agent in existence which would have aided petitioner's case. While Zochowski's counsel, on cross-examination of Agent Clinkscales, elicited that Clinkscales sometimes made notes of his conversations with Zochowski concerning the crimes about which the latter furnished information, the agent specifically denied that Zochowski had given him information as to the Sutro matter in the fall of 1961 or at any time prior to his arrest (Tr. H. 98). In these circumstances, the refusal of the court to delay the proceedings and require production was not error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1965.

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* The Solicitor General having disqualified himself.

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